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No. 92-1920

# In the Supreme Court of the United States

OCTOBER TERM, 1993

KAREN LIVADAS,
PETITIONER,

*v.*

LLOYD AUBRY, IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER FOR THE
STATE OF CALIFORNIA,
RESPONDENT.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

## REPLY BRIEF FOR THE PETITIONER

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# REPLY BRIEF FOR THE PETITIONER

## I. SUMMARY OF ARGUMENT

The Commissioner and the *amici* supporting him have not refuted Livadas' showing that the Commissioner's policy is preempted by federal labor law, as a direct imposition on NLRA §7 rights and as an interference in the collective bargaining process under *Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). This case is controlled by the Court's decisions in *Golden State Transit* v. *City of Los Angeles*, 475 U.S. 608 (1986) and 493 U.S. 103 (1989). Every condition for relief as set forth in those decisions is met here. This case is actually stronger because

(1) the federal rights secured to Livadas are specifically and definitely stated in the text of the NLRA, and (2) the Commissioner's refusal to take her claim was based on a general, state-wide policy, instead of being a single action taken in response to a particular labor dispute.

In tacit recognition of the fact that *Golden State* is indistinguishable except in ways that favor Livadas, the Commissioner and the *amici* supporting him avoid coming to grips with that decision. Significantly, none of them offers any defense of the reasoning used by the Court of Appeals majority to reverse the District Court's judgment for Livadas. Instead, they strike out in several different directions, each one requiring a radical revision of the law. The Commissioner and the Food Employers Council urge that the lowest-level Equal Protection analysis be substituted for the Court's established approach to labor law preemption, so that all the State needs to show is that it has a "rational basis" for depriving people of their NLRA rights. The Chamber of Commerce asks the Court to overrule *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 21-22 (1987) and hold that a State may not impose substantive employment standards that must be obeyed by the parties to a collective bargaining relationship covered by the NLRA. The Employers Group argues that a State should be analogized to an employer with different units of employees, and that the Court should follow Labor Board precedent which allows an employer to give varying terms and conditions of employment to different units. One of the most remarkable things about this case is the prodigious number of disparate theories advanced to defeat Livadas' claim, all of which depart at acute angles from the mainstream of the development of the law.



## II. THE COMMISSIONER HAS FAILED TO JUSTIFY HIS POLICY

### A. The Commissioner's Policy Is To Reject All Claims From Employees Covered By Collective Bargaining Agreements Providing For Arbitration, Regardless Whether A Claim Depends For Its Resolution On The Interpretation Of A Collective Bargaining Agreement

Despite the Commissioner's many admissions that his policy is not to take claims from employees covered by collective bargaining agreements containing arbitration clauses (*see* Petitioner's Brief at 10-12), he and the *amici* supporting him now try to reformulate the policy in the hope of saving it. They want to qualify the policy by saying that it applies only when interpretation or application of the collective bargaining agreement is involved. This *post hoc* development doesn't make the policy any better. As this case shows, "application" means to the Commissioner *any* reference to the collective bargaining agreement, even if it is for no other purpose than to find out the employee's wage rate. Because virtually every collective bargaining agreement includes employees' wage rates, this means that whenever a penalty under Cal.Lab.Code §203 is sought by an employee covered by a collective bargaining agreement with an arbitration clause, the Commissioner will reject the claim. In the end, therefore, the old and new formulations of the Commissioner's policy amount to the same thing. Furthermore, because 99% of collective bargaining agreements contain arbitration clauses, the policy boils down to whether the employees are covered by a collective bargaining agreement. This suggests the answer for why the Commissioner's intake form simply asks the employee whether she is "Union."

In the Commissioner's letter to Livadas rejecting her claim, the only reason given was that to calculate the penalty due her would require looking into the collective bargaining agreement to find her rate of pay. J.A. 16-17. It is obvious

that such a reference does not require the type of consideration of the terms of the collective bargaining agreement that would lead to Section 301 preemption under *Allis-Chalmers* v. *Lueck*, 471 U.S. 202 (1985) and *Lingle* v. *Norge Div. of Magic Chef*, 486 U.S. 399, 411 (1988). Faced with this, the Commissioner now struggles to suggest that some greater review of the collective bargaining agreement was necessary. His efforts fall far short of his goal. There was never any dispute about the amount Livadas was owed upon her termination. There was never any reason to evaluate whether Safeway correctly calculated the amount she was owed, because she never protested how much she was paid, but only when it was paid. The Commissioner also suggests that a more detailed review of the collective bargaining agreement is necessary to ascertain what was Livadas' "same rate of pay," since she was a part-time employee. The term "same rate," however, is not defined or used in the collective bargaining agreement; it is in Cal.Lab.Code §203. An employee's "same rate" is a matter of state law, and surely the Commissioner has dealt with the question how to determine this for part-time employees. All the information the Commissioner needed—wage rate and hours worked—was available in the payroll records Safeway was required to keep. No reference to the collective bargaining agreement was needed or appropriate.

### B. The Commissioner Would Substitute The Lowest-Level Equal Protection Analysis For The Court's Traditional Approach To Labor Law Preemption

The Commissioner has dropped his contention made below, that individual employees have no rights under the NLRA. Instead, he makes a new argument that a state may deny benefits to its citizens because they exercise federal rights, as long as there is a "rational basis" for doing so. Commissioner's Brief at 17-28. *See* Brief for Food Employers Council, Inc. at 10. He cites decisions in cases arising under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Livadas has never asserted any claims under



the Equal Protection Clause, however. The source of her rights is not the Equal Protection Clause, but is the NLRA. The Court has never employed a "rational basis" test to allow the States to regulate conduct protected or prohibited by the NLRA. To do so now, as the Commissioner invites, would be to wipe out all existing federal labor law preemption precedent. For instance, if *Golden State* had been analyzed using a "rational basis" test, no deprivation of the employer's immunity from governmental interference in its labor dispute would have been found. The City of Los Angeles could have plausibly argued that its local concerns in ending a disruptive transportation strike and preserving public safety were rational grounds for its denial of the company's franchise application under local law. These were specifically the concerns of Wisconsin and Missouri in *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383 (1951) and *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963), where the Court held that they did not justify governmental intervention in a strike.

The Commissioner cites a passage from *Lingle* where the Court stated that a state law covering only unionized workers would not be preempted *by §301* if no collective-bargaining agreement interpretation was needed to resolve claims brought thereunder. *Lingle*, 486 U.S. at 408, fn. 7, cited at Commissioner's Brief, p. 30. The Court was not called upon, and did not, consider whether a state law that withheld benefits from unionized employees would pass muster under *Brown* v. *Hotel Employees*, 468 U.S. 491, 500-503 (1984); *Machinists* v. *Wisconsin Employment Relations Commission, supra*, or *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 243-244 (1959). When the question of the applicability of §1983 to the deprivation of NLRA rights was taken up by the Court two years later in *Golden State II*, the Court made it plain that differential treatment of citizens by state or local government based upon the exercise of federal rights is not permitted even if the state asserts a "rational basis" for it.

### C. The Commissioner Cannot Justify His Policy By Claiming It Encourages Arbitration Under Collective Bargaining Agreements

The Commissioner argues that his policy is justified because it is part of California's strong policy in favor of arbitration. In fact, however, the State has a policy against arbitration of Labor Code claims, which is stronger than its policy in favor of arbitration in other contexts. *See Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 131-133 (1973). Accordingly, Cal.Lab.Code §229 commands that arbitration provisions be disregarded, except in the case of collective bargaining agreements.

Nevertheless, even though the sentence about collective bargaining agreements is nothing more than an exception to a general anti-arbitration rule, the Commissioner insists that this represents a strong public policy in California that the Court ought to respect. The policy, according to the Commissioner, is to favor arbitration under collective bargaining agreements. It ought to be respected in this case, he says, because it is consistent with federal labor policy favoring arbitration.

The Commissioner does not address the fact that federal law alone governs in this area. *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962). In developing the exclusive federal law of labor arbitration under §301, the Court has observed the congressional direction in LMRA §203(d) to fashion rules greatly favoring the arbitration process. In fact, these rules about arbitration comprise most of the law under §301. But the States have no role in this, except to follow the exclusive federal law as developed by the federal courts. It does not matter that state law seeks the same objectives as federal law. *See Wisconsin Department of Industry* v. *Gould, Inc.*, 475 U.S. 282, 288-289 (1986). It can hardly be said, however, that the Commissioner's policy supplements federal labor policy in any positive way. As a price for choosing to bargain collectively for arbitration, employees lose the protection of the California Labor Code. Penalizing this choice can hardly be said to encourage it.



### D. To Defeat Livadas' §1983 Claim, The Commissioner Urges That The NLRA Does Not Confer "Specific" And "Definable" Rights, A Position Rejected By The Court In *Golden State II*.

The Commissioner does not argue now as he has before (Supplemental Brief by Respondent at 6, fn. 3) that his agency's rejection of Livadas' claim was an adjudication. The implicit concession that the summary dismissal of Livadas' claim was not an adjudication is fatal to his attempt to avoid §1983 relief. Where a state actor has interfered with the exercise of federal rights in a non-judicial capacity, there is no reason for the federal courts to abstain from issuing injunctive and declaratory relief. *See New Orleans Public Service, Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 369-70 (1989).

Instead, the Commissioner makes an entirely new argument that §1983 gives no remedy here because Livadas' rights under the NLRA are not "specific and definable." Commissioner's Brief at 45-49. This line of reasoning is foreclosed by the Court's decision in *Golden State II*. There, the Court ruled that freedom from state regulation under the *Machinists* preemption doctrine was sufficiently "specific and definite" for §1983 purposes. 493 U.S. at 110-112. In the present case, Livadas' rights under the NLRA are spelled out in the statute, and specifically secure to her the right to select a collective bargaining representative, bargain for a contract through the representative, and to include an arbitration clause in the bargain. Her rights are much more specific and definable than those of the employer in *Golden State II*.

Despite this, the Commissioner believes he cannot be reached under §1983 unless the statute contains a clear directive *to him*. He cites cases[1] where the issue was the definite-

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[1] *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1 (1981); *Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987) and *Wilder* v. *Virginia Hospital Association*, 496 U.S. 512 (1990).

ness of instructions given by federal law to state and local officials. *Golden State II*, however, did not involve any statutory directions to state and local officials. The City of Los Angeles in that case made the same argument the Commissioner does here, and it was rejected.

> The city's contrary argument, that the NLRA does not secure rights against the State because the duties of the State are not expressly set forth in the text of the statute, is not persuasive. . . . The violation of a federal right that has been found to be implicit in a statute's language and structure is as much a 'direct violation' of a right as is the violation of a right that is clearly set forth in the text of the statute.

*Id.*, 493 U.S. at 111-112.

The Commissioner further complains about this Court's own decisions on §301 preemption, calling them a "tangled web." He asserts that no §1983 action should lie when the principles the Court laid down in those cases are violated. Commissioner's Brief at 48-49. It is not entirely clear to the Petitioner what point the Commissioner is trying to make, since her theory of this case is not that the Commissioner's refusal of her claim violated §301 preemption principles, but rather that those principles did not justify the refusal.[2] Her claim is based squarely on the Commissioner's systematic discrimination against those who have exercised their NLRA §7 rights, not on any provisions of her collective bargaining agreement.

Livadas' rights under the NLRA are specific and explicit. This Court's decision in *Lingle* dispels any doubt that Livadas' Cal.Lab.Code §203 claim is not preempted—so completely, indeed, that no one now attempts any argument to the contrary. There is no "thin line" here between principles

[2] The Commissioner's justification at earlier stages in this case has rested on the belief that Livadas' claim was preempted by §301. *See* Defendant's [Appellant's] Opening Brief, in the Court of Appeals, at 3, 34; J.A. 34-35.



of labor law preemption. The Commissioner is not entitled to any sympathy for his reluctance to proceed, for the avenue is broad and open.

## III. UNLIKE *FT. HALIFAX*, THE COMMISSIONER'S POLICY DEPRIVES EMPLOYEES OF LABOR CODE PROTECTIONS REGARDLESS OF WHAT HAPPENS IN COLLECTIVE BARGAINING; THERE IS NO BASIS IN THIS CASE FOR CONSIDERING WHETHER THERE WAS A WAIVER OF SUCH PROTECTIONS

The statute in *Fort Halifax* provided for severance pay in the event of a plant closure, but stated that its terms would not apply to an employee who was covered by an express contract providing for severance pay. 482 U.S. at 4, fn. 1. The Court held that the statute was not preempted by virtue of the power of employees to *agree* to a different arrangement, including through the vehicle of collective bargaining. *Id.* at 22. This type of statutory provision is quite common. All of the statutes described in Parts I, IV and V of Addendum B to the Employers Group brief are like this: the provisions of the statute apply unless the parties have *agreed* to something different in a collective bargaining agreement. Every statute except Or.Rev.Stat. §279.334 in Part II of the addendum, and all of the statutes except the Nevada and Oregon statutes in Part III of the addendum, are from this mold.

Cal.Lab.Code §229 is different. As interpreted by the Commissioner, it deprives employees of many of the protections of the Labor Code regardless of whether they have agreed in collective bargaining to a substitute arrangement.[3] The Commissioner has already exercised this option, for all employees covered by collective bargaining agreements and for all time.

[3] The Commissioner confuses the issue by identifying the minimum labor standard at issue as Cal.Lab.Code §229. The minimum labor standard at issue is the statutory requirement of immediate wage payment on discharge and daily penalties for any delay, enacted by Cal.Lab.Code §§201 and 203. Cal.Lab.Code §229 *withdraws* the State's mimimum labor standards from those with collective bargaining agreements.

There is no decision to be made in collective bargaining whether to keep or trade Labor Code rights; this has been foreclosed by the Commissioner's policy. It is therefore clear that (1) Section 229 cannot be compared to the statute in *Fort Halifax*, as the Commissioner attempts to do, and (2) the decision Livadas seeks in this case will not have the far-reaching effect on other state statutes claimed by the Employers Group.

The Commissioner argues that there is a option in this statute as there was in *Fort Halifax*, because any workers covered by a collective bargaining agreement could have the benefits of the Labor Code by electing not to have any arbitration under their agreement. Commissioner's Brief, p. 33.[4] However, in a somewhat obscure passage (Commissioner's Brief, p. 33, last paragraph), the Commissioner seems to suggest that the choice here is not simply Labor Code protection and no arbitration, on the one hand, and arbitration but no Labor Code, on the other. The other route ("the bay"), he suggests, is for employees to negotiate "their own standards and remedies within the collective bargaining agreement." This is, of course, the same as the "arbitration, no Labor Code" choice: *of course*, if the Labor Code protections are denied them, employees can try to negotiate some of these back. But they must consume limited bargaining resources to win back a right all other employees enjoy as a matter of law. This practice imposes an unjustified surcharge on workers' exercise of their NLRA rights.

[4] Contrary to the Commissioner, the AFL-CIO has not taken a position here different from what it urged in *Fort Halifax*. As the portion of its brief quoted by the Commissioner shows (Commissioner's Brief, p. 32), the AFL-CIO took the position in *Fort Halifax* that the ability provided under the Maine statute for employees to *contract* out of the statutory severance pay arrangement enhanced collective bargaining. Section 229 has the opposite effect, because it denies workers the benefit of the Labor Code regardless of what happens in collective bargaining.



The *amici* in support of the Commissioner take up this last point, and argue explicitly that merely choosing to have a collective bargaining agreement amounts to waiver of state-law protections. Employers Group Brief, pp. 17, 23-25; Chamber Brief, pp. 13-14. They are forced to this extreme position because there is nothing in this case to suggest an intentional waiver of Cal.Labor Code §§201 and 203, let alone contracting out of those standards. There is not a word in Livadas' agreement on the subject of when terminated employees are to be paid their accrued wages. There is no evidence that this subject was ever even discussed in negotiations. California law forbids waiver of these rights.[5] In *Lingle*, the Court reserved the question whether a union may waive its members' individual, non-preempted state-law rights. 486 U.S. at 409, fn. 9. Despite the urging of *amici*, this question is not ripe for decision here, either, given the absence of anything to suggest a waiver. The Court has explained that if it ever takes up this very difficult question, it will only be on a record showing "clear and unmistakable" evidence, under *Metropolitan Edison* v. *NLRB*, 460 U.S. 693, 708 (1983), that a waiver was intended.

Moreover, the Court has already rejected *amici*'s contention that a forfeiture of state-law rights occurs just because collective bargaining exists.

> It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to any state law that substantively regulates employment conditions. Both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations. *Ibid.* (quoting *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, 228 (1970) (concurring opinion)). Absent a collective-bargaining agreement, for instance, state common law generally permits an employer to run

[5] Cal.Lab.Code §219 provides in relevant part: ". . . [N]o provision of this article [Cal.Lab.Code §§200-243] can be contravened or set aside by a private agreement, whether written, oral, or implied."

> the workplace as it wishes. The employer enjoys this authority without having to bargain for it. The parties may enter negotiations designed to alter this state of affairs, but, if impasse is reached, the employer may rely on preexisting state law to justify its authority to make employment decisions; that same state law defines the right and duties of employees. Similarly, Maine provides that employer and employees may negotiate with the intention of establishing severance pay terms. If impasse is reached, however, preexisting state law determines the right of employees to a certain level of severance pay and the duty of the employer to provide it. Thus, the mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption, for 'there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues . . . that may be the subject of collective bargaining.' *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504-505 (1978).

*Fort Halifax*, 482 U.S. at 21-22.

The Chamber of Commerce essentially asks the Court to overrule *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724 (1985) and *Fort Halifax*. It complains (Chamber Brief, pp. 22-24) that States should not be allowed to impose substantive employment terms where there is a NLRA collective bargaining relationship. It is asserted that this will improperly narrow the "corridor" available for collective bargaining. This is precisely what the Court held in *Metropolitan Life* and *Fort Halifax* that the States have the power to do. It was pointed out that the States have long had and exercised this power, before the NLRA was enacted, and that Congress had no intent to displace or supplant the States in this regard.[6]

[6] The Chamber cites *H.K. Porter* v. *NLRB*, 397 U.S. 99 (1970) in support of the proposition that States should be denied this power. The decision in that case, however, involved only the question whether the NLRA allows the NLRB to mandate the substantive terms of collective bargaining agreements, and held that it does not, because the NLRA only provides the process for collective bargaining, not its content. The Court in *H.K. Porter* said nothing about the power of states to substantively regulate the employment relationship. This procedural/substantive distinction between the NLRA and state law was explicitly recognized by the Court in *Metropolitan Life*, 471 U.S. at 753-755.



## IV. A STATE IS NOT LIKE A PRIVATE ACTOR UNDER THE NLRA, AND ITS ACTIONS CANNOT BE JUSTIFIED BY REFERENCE TO WHAT AN EMPLOYER OR UNION COULD DO

The Employers Group, *amicus curiae*, submits that if a private employer could legally do what the State did, then there is no preemption and no deprivation of federal rights. Other than a sentence out of context from *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967)[7], nothing is cited in support of this proposition, for the Court has never intimated that this would be an acceptable mode of analysis. If adopted, it would produce bizarre results. *Golden State* could not have been decided as it was, because a private employer is free under NLRB precedent to decline to do business with another company with labor problems such as an

[7] The Court in *Nash* said, "We have no doubt that coercive actions which the Act forbids employers and unions to take against persons making charges are likewise prohibited from being taken by the States." *Id.*, 389 U.S. at 239. This was not the Court's *ratio decidendi*. The Court decided, "Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan (footnote omitted)," citing *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819) and other cases holding that under the Supremacy Clause, the States may not burden the operation of federal laws. The question in any preemption case is whether the state law has such an effect, not whether a private person might lawfully take the same action. The Employers Group has attempted to pull this entire case through a pin hole. It has seized on a single sentence from *Nash* and has tried to make out of it an entirely new theory of preemption and §1983 analysis.

impending strike. *See NLRB* v. *Servette, Inc.*, 377 U.S. 46, 49-54 (1964). The standards at issue in *Metropolitan Life* were set unilaterally by Massachusetts, which would have been unlawful for an employer or a union to do under the NLRA. *See NLRB* v. *Katz*, 369 U.S. 736, 744 (1962). *Wisconsin* v. *Gould* would have been decided in favor of Wisconsin's debarment law, because a private employer may decline to deal with another company with a record of violating federal labor laws. Indeed, in that case the Court addressed and soundly rejected the idea of equivalency under the NLRA between private actors and the States:

> Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. [cit. om.] The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. [cit. om.] The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.
>
> 475 U.S. at 290.

Using its "private actor" test, the Employers Group reasons that because employers under the NLRA may provide different terms and conditions of employment to unrepresented workers than it agrees to for a unit of unionized workers, a State could do the same thing, as California has done here. If this notion became law, a State could legislate higher minimum wages for union-represented employees than for those without representation. It could require that the employment of unrepresented workers be "at will," while just cause was required to terminate anyone represented by a



union. Such laws would replicate differential conditions presently existing in private employment.

In any event, the NLRB has *not* consistently held that an employer may give different terms and conditions of employment to units of represented and unrepresented employees. In its most recent case on the subject, the Labor Board stated:

> We agree with the General Counsel's and the Union's contentions that the Respondent unlawfully excluded bargaining unit employees from participating in its severance plan. In *Niagara Wires*, 240 NLRB 1326 (1979), the Board found that the maintenance of an employee benefit plan that restricted coverage to unrepresented employees violated Section 8(a)(1) because it conveyed to employees the impression that they would lose the benefit if they ever chose union representation. The severance plan provided for in the Respondent's policies and procedures manual clearly conveys that impression. There is no evidence in the record to suggest that severance benefits were ever discussed in negotiations with the Union, or that the Respondent considered them a subject for bargaining. Nor does the record indicate that the severance benefits set forth in the Respondent's manual codified a historical practice of excluding unit employees.[16] Thus, there is nothing in the record that might dispel the message that the loss of severance benefits was the necessary result of choosing union representation. [footnote omitted].
>
> [16] In this regard, we find this case factually distinguishable from our decisions in *KEZI, Inc.*, 300 NLRB 594 (1990); *Fabric Warehouse*, 294 NLRB 189-92 (1989); *Lynn-Edwards Corp.*, 290 NLRB 202 (1988); *A. H. Belo Corp.*, 285 NLRB 807, 808-809 (1987); and *Handleman Co.*, 283 NLRB 451, 452 (1987).

*A.M.F. Bowling Co.*, 303 NLRB 167, 170-171 (1991). It seems that under the Labor Board's current view, the test proposed by the Employers Group would mean that Livadas prevails. Unlike the prior cases distinguished by the Labor Board in *A.M.F. Bowling*, the distinction in Cal.Lab.Code §229 is not

a codification of historical practice. For more than 40 years before the enactment of §229 in 1959, the requirements of immediate payment upon termination, providing penalties for violation of this requirement, and mandating the Labor Commissioner to enforce employees' claims had applied to all California employees without distinction. *See* Petitioner's Brief, p. 22, fn. 11. Nevertheless, despite the advantage Livadas might gain from the Employer's Group theory in the present case, it would lead to such turmoil that the Court should not consider it.

## V. THE CASE IS NOT MOOT

The Chamber of Commerce suggests that the case is moot because an arbitrator reinstated Livadas to her job with partial back pay (Chamber Brief, p. 17, fn. 9). This is based on the Labor Commissioner's suggestion that the employer would have a defense to penalty wages based on the employee's ultimate reinstatement with full back pay (Respondent's Brief, p. 4). The Commissioner does not cite any authority or offer any reasoning in support of this suggestion. It is not California law. Under Cal.Lab.Code §203, an employer's subsequent settlement does not extinguish a penalty claim for late payment of wages that were concededly due at the time of discharge. *See Sullivan* v. *Del Conte Masonry Co.*, 238 Cal.App.2d 630, 633-34, 48 Cal.Rptr. 160, 163 (Cal.Ct.App. 1965); *Triad Data Services, Inc.* v. *Jackson*, 153 Cal.App.3d Supp. 1, 11, 200 Cal.Rptr. 418, 424 (Cal.App.Div. 1984). The wages due Livadas upon her termination were those she earned before she was fired, not after. The back pay she got in the arbitration over her termination covered the period *after* she was fired. The purpose of the requirement of payment upon termination, and the penalties to enforce this, is to immediately give the worker facing unemployment all of his or her accrued wages. The worker who is reinstated months later (in Livadas' case, six months) is just in much of need of income at the time of termination as one who is never reinstated.



Furthermore, as the arbitration award shows, the issue was whether or not Livadas was terminated for just cause, not whether she was paid her accrued wages immediately upon her termination. The latter is not even mentioned in the arbitration award, because it was not part of the case. Nothing in the collective bargaining agreement authorizes a penalty for late payment of accrued wages to a terminated employee, and this arbitration award accordingly gave no such penalties. The statutory claim and the contractual grievance have always been, and still are, completely separate.[8]

## VI. CONCLUSION

The Court should reverse the decision of the Court of Appeals and hold (1) that Livadas' claim for late-payment penalties was not preempted by federal law, (2) that the Commissioner's policy not to pursue employees' unpreempted state-law minimum standards claims solely because they are covered by collective bargaining agreements with arbitration clauses burdens employees' NLRA §7 rights and is therefore preempted, and (3) that Livadas is entitled under §1983 to injunctive relief from the Commissioner's policy.

Respectfully submitted,

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[8] Finally, even if Livadas' 1990 claim for penalties were no longer viable under California law, this case would not be moot. Livadas is attacking an explicit state-wide policy that adversely affects both Livadas and all other fellow union members. The Commissioner's exclusion policy is "fixed and definite," is therefore likely to recur, and "is a factor lurking in the background of every incipient labor contract" in California. *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 124 (1974). The Commissioner's ongoing policy continues to affect the calculus of collective bargaining, and so this case is not moot. *Cf. id.*